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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL BLACK WOMEN'S HEALTH PROJECT AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

(1) Whether a policy which explicitly bars all women of child bearing capacity from employment constitutes a prima facie case of disparate treatment.

(2) Whether the business necessity defense, available to rebut a prima facie case of disparate impact, can be applied to justify overt disparate treatment.

(3) Whether employers have a defense under Title VII that permits them to maintain facially discriminatory policies and unhealthy work environments.

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INTEREST OF AMICI CURIAE

The NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. ("LDF") is a national non-profit corporation formed to assist African Americans in the vindication of their constitutional and civil rights. For many

years LDF has pursued litigation to secure the basic civil and economic rights of low-income black families and individuals. Intentional and unintentional employment practices which discriminate against African Americans have been a primary LDF concern. LDF has also worked on behalf of African Americans struggling with the burden of poor health and discriminatory and inadequate health care services.

LDF is particularly concerned with the growing rates of poverty among African Americans and with the number of single female-headed African American families that are living in poverty. Through its Poverty & Justice Program, LDF is challenging the barriers to economic advancement to help improve the economic status and living conditions of the many in poverty. LDF's Black Women's Employment Program strives to remove obstacles to

employment in occupations where African American women are underrepresented and to provide access to jobs with better wages, decent conditions, and pension and health benefits. Currently, the majority of working African American women are employed in low-paying occupations.

The NATIONAL BLACK WOMEN'S HEALTH PROJECT is a health, education and advocacy organization which works to improve the quality of life for African American women. It works to promote non-discriminatory approaches to insure that all African American women have access to health services, including abortion, that maximize maternal health, reduce infant mortality and produce healthy babies. Because poor African American women are particularly vulnerable to economic coercion, the impact of exclusionary policies may be particularly severe for them.

Letters from the parties consenting to the filing of this brief have been filed with the Court.

SUMMARY OF THE ARGUMENT

Amici, supporting petitioners, address two important issues: first, the applicability of settled distinctions in employment discrimination law to fetal protection policies; and second, the impact of such policies on African American workers and their children.

First, it is well established that Title VII of the Civil Rights Act of 1964 prohibits two discrete types of employment discrimination: disparate treatment and disparate impact. Employment policies that are discriminatory on their face -- that is, they distinguish individuals on the basis of their gender -- can be upheld by courts only under extraordinary circumstances: an employer must establish

that sex is a BFOQ, a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. As this Court has recognized, the BFOQ was meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex. By contrast, cases of disparate impact, involving facially neutral policies or practices, can be answered by a claim of business necessity.

Fetal protection policies which exclude all fertile women from particular jobs in order to prevent possible damage to potential fetuses are facially discriminatory. They classify job applicants and employees by gender and treat individuals differentially on the basis of that classification. Such policies bar the employment of all women of child-bearing capacity, whether or not they are pregnant

or contemplating pregnancy, but do not prohibit the employment of male workers whose reproductive health may also be damaged by workplace hazards.

The Seventh Circuit's application of the business necessity defense to a facially discriminatory fetal protection policy was erroneous, as it blurred the essential difference between disparate treatment and disparate impact cases. This case has the potential to disrupt settled analytic standards and to dilute legal protections against employment discrimination. Employers with potentially hazardous work environments should not be allowed to deny employment opportunities to a class of workers who are believed to be at greater risk in a hazardous environment because of gender or genetic make-up, but, instead, should be required to protect the health and safety of all workers.

Second, African American workers are overrepresented in industries and occupations that pose significant health and safety hazards. Reductions in health and safety protections for workers, which that may result if employers are allowed to evade their responsibility to make workplaces safe for all employees, will disproportionately adversely effect African Americans.

Moreover, exclusionary policies that restrict employment opportunities for all women will further limit access for low-income women to better-paying jobs, as well as their attendant health and pension benefit programs. Most working poor, female single-headed families, a disproportionate number of whom are African American, face poverty and lack health coverage. No barriers to improving the

economic and health outlook of these families should be permitted.

ARGUMENT

I. AN EXPLICIT CLASSIFICATION BASED ON SEX AND THE CAPACITY TO HAVE CHILDREN IS NOT GENDER NEUTRAL AND CONSTITUTES DISPARATE TREATMENT

A. The Distinct Types of Discrimina- Practices Proscribed in §703(a)

Title VII forbids two types of employment discrimination. The first, disparate treatment, both overt or facial and covert or pretextual, is prohibited by §703(a)(1) of Title VII.[1] "'Disparate

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[1] The statutory proscription against discriminatory treatment states:

> It shall be an unlawful employment practice for an employer:
>
> 1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

treatment'...is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.'" International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

"A disparate impact claim," on the other hand, "reflects the language of §703(a)(2)."[2] Connecticut v. Teal, 457 U.S.

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§703(a) of Title VII, 42 U.S.C. §2000e-2(a).

[2] The statutory proscription against discriminatory impact states:

> It shall be an unlawful employment practice for an employer:
>
> 2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

440, 448 (1982). Claims of disparate impact "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Teamsters, 431 U.S. at 335 n. 15.

Although the §703 framework evinces no intent to restrict plaintiffs to one of the two provisions as an exclusive remedy,[3]

> otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§703(a) of Title VII, 42 U.S.C. §2000e-2(a).

[3] Several lower courts have held that plaintiffs may also bring disparate impact challenges under §703(a)(1). See, e.g., Colby v. J.C. Penney Co., 811 F.2d 1119, 1127 (7th Cir. 1987); Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1494 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); cf. Nashville Gas Co. v. Satty, 434 U.S. 136, 144 (1977)(The Court "need not decide whether ...it is necessary to prove

the statutory language clearly encompasses two distinct forms of discrimination: disparate treatment and disparate impact.

The Court has applied §703(a)(1) in a variety of circumstances involving disparate treatment. See, e.g., Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) (direct evidence of a policy of disparate treatment); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (individual disparate treatment); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) (pattern or practice of disparate treatment). The standard for evidentiary analysis applied in these cases depends upon the existence of direct evidence of discriminatory treatment. Where direct evidence is absent, the

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intent to establish a prima facie violation of §703(a)(1).").

plaintiff must establish a prima facie case through circumstantial evidence. See McDonnell Douglas, 411 U.S. at 802. "The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). By contrast, "the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." Thurston, 469 U.S. at 121.

An employment policy or practice is established as facially discriminatory, without further need to show a discriminatory intent, where plaintiff's direct evidence of discrimination is accepted. Arizona Governing Committee v.

Norris, 463 U.S. 1073, 1084 (1983) (retirement plan paying lower benefits to women than to men is facially discriminatory); Manhart, 435 U.S. at 708 (policy requiring female employees to make larger contributions to pension fund than male employees is facially discriminatory); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam) (policy of hiring men but not women with pre-school age children is facially discriminatory); Thurston, 469 U.S. at 121 (policy conditioning transfer rights on age of airline captains is facially discriminatory).

B. An Employment Policy Which Explicitly Classifies Applicants and Employees According To Gender And Capacity To Have Children Is Facially Discriminatory Under §§703(a)(1) and 701(k)

"Section 703(a) of the Civil Rights Act of 1964 requires that persons of like

qualifications be given employment opportunities irrespective of their sex." Phillips, 400 U.S. at 544. "It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." Manhart, 435 U.S. at 708.

Demonstration that an employer openly differentiates between male and female applicants or employees is direct evidence of discrimination. As such, an employment policy which is written with an explicit reference to gender and applies to all individuals of one sex and not the other has always been held to be facially discriminatory. See Norris, 463 U.S. at 1084 (benefit levels based on gender); Manhart, 435 U.S. at 708 (contribution requirement based on gender); Phillips, 400 U.S. at 544 (separate hiring policies for women having pre-school children and for

men similarly situated). As this Court has stated, "Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." Manhart, 435 U.S. at 709.

"Fetal protection policies," such as the hiring policy at issue in the present case, explicitly classify applicants and employees by gender. These policies require that female applicants -- but not males -- offer proof of sterility. Employers thus explicitly categorize prospective and current employees by sex despite abundant evidence that toxic exposure in the workplace poses a health hazard to the potential offspring of both male and female workers.[4] See 43 Fed.Reg.

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[4] In addition, employers justify the employment policy in a facially discriminatory way: the stated intention of the policy is to protect not only

male and female workers.[4] See 43 Fed.Reg. 52953, 52966 (1978) (Occupational Safety and Health Administration, OSHA, finding that "male workers may be adversely effected [sic] by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy."); United Steelworkers of America, etc. v. Marshall, 647 F.2d 1189, 1257 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981) (OSHA found "abundant support" for view that lead exposure presents health risks to offspring of male

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[4] In addition, employers justify the employment policy in a facially discriminatory way: the stated intention of the policy is to protect not only potential offspring but also "their mothers." The risk of harm to potential fathers is not granted similar consideration. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, at 884 n.25 (7th Cir. 1989).

and female workers and, thus, the standard for lead exposure must protect reproductive capacities of both sexes). See also Staff of House Comm. on Ed. and Labor, 01st Cong., 2d Sess., Report on The EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s, at 7-9 (Comm. Print 1990); Chris Winder, "Reproductive and Chromosomal Effects of Occupational Exposure to Lead in the Male," 3 Reproductive Toxicology 221 (1989).

Employment policies that differentiate between males and females for the purpose of evaluating the risk of damage to potential offspring are based on unwarranted assumptions and stereotypes about class characteristics: such gender-based classifications are simultaneously underinclusive, since lead exposure increases reproductive risks for both male and female workers, and overbroad, by

encompassing all female employees, even though most women in an industrial labor force do not become pregnant. Johnson Controls, 886 F.2d at 913 (Easterbrook, J., dissenting). These explicit gender-based policies are indeed founded upon discriminatory assumptions about the relevance of physical differences. They improperly impute to every individual female generalizations about risks to fetal health posed by the class of females as a whole. "Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." Manhart, 435 U.S. at 708.

In 1978, Congress amended the Civil Rights Act of 1964 to clarify its intent that gender distinctions based on "pregnancy, childbirth, or related medical conditions" are also prohibited by Title VII.

§ 701(k) of Title VII provides, in part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work....

42 U.S.C. §2000e(k)(emphasis added). Congress thus esta-blished that differential treatment of pregnancy is gender-based discrimination. Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). The legislative history of this amendment to Title VII makes clear that distinctions based on the child-bearing capacity of women constitute sex discrimination. H.R. Rep. 948, 95th Cong., 2nd Sess. at 2, 5, 6, reprinted in 1978 U.S. Code Cong. & Admin. News 4749, 4750,

4753, 4754. Thus, explicit classifications based on the capacity to become pregnant, even though they are based on real physical differences between men and women, are proscribed by Title VII.

Despite the fact that Johnson Controls' fetal protection policy is facially discriminatory, the Seventh Circuit failed to apply the analytic framework appropriate for cases of disparate treatment. The court's "flexible" approach to claims of overt discrimination, see Johnson Controls, 886 F.2d at 883, threatens to dilute protection against the most egregious forms of employment discrimination, including explicit classifications on the basis of race.[5] At least one major company has

[5] Significantly, facial discrimination on the basis of race is simply impermissible: the BFOQ exception to the prohibition of such discrimination is not available to defend racial classifications. See §703(e) of Title VII, 42 U.S.C. 2000e-2(e) (defense limited to "those certain instances where religion, sex, or national origin is a bona fide occupational qualification...."). Application of the business necessity defense to claims of facial and intentional discrimination would turn the clock back on employment discrimination law by allowing a defense for explicit racial classifications.

adopted a workplace screening and hiring policy that classified applicants and employees on the basis of race. The rationale is analogous to that used for fetal protection policies: because of group differences, specifically a greater incidence of sickle cell trait, particular workplace hazards pose heightened risks to the health of African Americans. Although it is generally accepted that the trait for sickle-cell anemia is harmless, the Du Pont Company adopted a policy designed to reduce health risks by screening all group members for the sickle cell trait and, then, by

excluding all individuals with the trait from jobs involving exposure to hazardous substances. See R. Severo, "The Genetic Barrier: Job Benefit or Job Bias," The New York Times Feb. 3, 4, 5, 6, 1980, reprinted 1980 by Womens Occupational Health Resources Center, Columbia Univ. This Court should not countenance a decision which disregards the basic distinction between disparate treatment and disparate impact cases that has guided twenty-five years of Title VII jurisprudence and provided protection against employment policies that would classify individuals on the basis of group membership.

II. STATUTORY LANGUAGE, THE STANDARD OF EVIDENTIARY ANALYSIS DEVELOPED BY THE COURT, AND ADMINISTRATIVE INTERPRETATION DEMONSTRATE THAT A CASE OF DISPARATE TREATMENT CAN ONLY BE OVERCOME BY THE ESTABLISHMENT OF A BONA FIDE OCCUPATIONAL QUALIFICATION

Title VII prohibits discrimination on the basis of gender unless sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." §703(e) of Title VII, 42 U.S.C. 2000e-2(e). The Bona Fide Occupational Qualification (BFOQ) "was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

When an employer asserts that gender is a bona fide occupational qualification, the employer has the burden of persuasion. Price Waterhouse v. Hopkins, 490 U.S. __,

104 L.Ed.2d 268, 287 (1989). The employer must demonstrate, first, that the occupational qualification is "reasonably necessary to the normal operation of [the] particular business. Second, "[t]he principle of nondiscrimination" requires that the employer show that "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969).

The Pregnancy Discrimination Act explicitly defined the standard to be applied in cases of gender discrimination involving the capacity of women to bear children: a showing of disparate treatment can be overcome only by a showing that female employees differ from others "in their ability or inability to work." §701(k) of Title VII, 42 U.S.C. 2000e(k).

By contrast, business necessity can be asserted to justify facially neutral practices that have an adverse impact on members of a protected class. This Court recently stated the relevant query: "[in] a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Wards Cove Packing Co. v. Atonio, 490 U.S. __, 104 L.Ed. 733, 752 (1989).

Business necessity has never been a defense to overt discrimination. The Seventh Circuit's adoption of the business necessity defense in this case was an attempt to circumvent the requirements of the BFOQ defense. The California Court of Appeal which also considered Johnson Controls' fetal protection policy expressly disagreed with and declined to follow the

reasoning of the Seventh Circuit. The state court properly found the employment policy facially discriminatory and concluded that only the BFOQ defense applied. "The fact that it may be difficult for the employer to meet the BFOQ standard in a [fetal protection policy] situation is a concern of the legislature." Johnson Controls, Inc. v. California Fair Employment and Housing Commission, 218 Cal.App.3d 517 (1990) at 37. To adopt the business necessity defense in this context is to "champion an analysis which holds that overt, facial discrimination creates only a presumption of discrimination." Id. at 39.

Administrative interpretation of Title VII also supports the position that only the demonstration of a BFOQ can overcome a case of disparate treatment. An Equal Employment Opportunity Commission internal

policy guidance issued after the Seventh Circuit's Johnson Controls decision stated that fetal protection policies which exclude only women constitute per se violations of Title VII.[6] "For the

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[6] Although the EEOC's statements regarding the proper analytic framework for review of fetal protection policies have not been consistent, see Staff of House Comm. on Ed. and Labor, 101st Cong., 2d Sess., Report on The EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s (Comm. Print 1990), it is significant that on January 24, 1990, the Commission released a guidance in which it took issue with the Seventh Circuit's Johnson Controls decision and expressly instructed EEOC staff to disregard the court's opinion. EEOC Policy Guidance on United Auto Workers v. Johnson Controls, Inc. Daily Lab. Rep. (BNA) No. 18, at D-1 (January 26, 1990). This recent statement takes a clear position. In contrast, the Commission's earlier guidance, quoted at length by the Seventh Circuit, was merely interpretive. The 1988 guidance was limited to the elaboration of the framework suggested by existing judicial interpretations. See EEOC Policy Guidance on Reproductive and Fetal Hazards Daily Lab. Rep. (BNA) No. 193 at D-1 (October 5, 1988); see also Staff of House Comm. on Ed. and Labor, 101st Cong., 2d Sess., Report on The EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s (Comm. Print 1990), at 22-23.

plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law." EEOC Policy Guidance on Auto Workers v. Johnson Controls, Inc. Daily Lab. Rep. (BNA) No. 18, at D-1 (January 26, 1990). The Commission found the application of the more narrow BFOQ defense "consistent with Title VII's structure and purpose." Id.

Employers simply should not be permitted to implement policies that infringe on the right to fair employment. The relaxation of standards allowed by the Seventh Circuit is a dangerous precedent - with consequences that extend well beyond the context of fetal protection policies. Employment discrimination law prohibits, and should continue to prohibit, the wholesale exclusion of a class of people from the workplace. Categorical exclusion

cannot be justified by the belief that some individuals within the class may be particularly susceptible to the harmful effects of toxic substances. Title VII does not allow employers to institute policies that sacrifice women's employment opportunities instead of cleaning dirty workplaces.

III. UNHEALTHY WORKPLACES DISPROPORTIONATELY ADVERSELY AFFECT AFRICAN AMERICAN WORKERS BECAUSE THEY ARE OVERREPRESENTED IN DIRTY INDUSTRIES AND JOBS

Unhealthy work environments will disproportionately adversely affect the health status of African American workers. Historic job discrimination and poor training and education have combined to concentrate African American workers, both men and women, in unhealthy industries and in the most hazardous jobs. Policies which allow employers to exclude women, rather than require a clean and safe work

environment for all workers, will have particularly devastating effects on African Americans.

In general, African Americans are overrepresented in laundry and dry cleaning, tobacco manufacture, fabric mills, smelters, hospitals and service industries. Within these industries, African Americans also tend to be concentrated in the dirtiest jobs, such as coke ovens, which are usually tended by African American steelworkers, and opening, picking and sorting operations in textile mills.[7]

Furthermore, migrant farm workers, estimated to be 75 percent Chicano and 20 percent African American, have among the

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[7] Pollack and Grozuczak, Reagan, Toxics and Minorities, Urban Environment Conference c/o United Steelworkers of America 2 (1984) (hereinafter cited as Reagan, Toxics)

most dangerous and least protected jobs of all workers.[8] Their exposure to pesticides, heat, mechanical hazards, noise and dust, combine with poverty and poor medical care to lower the life expectancy of a farmworker to 49 years, more than 20 years less than the national average.[9]

A. The Overall Health Status of African American Workers Is Affected by Toxic Work Environments

When compared with whites, the health indices of African Americans are alarmingly

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[8] In a 1969 study of Florida agricultural workers exposed to pesticides, it was found that African Americans were assigned mostly to mixing, formulating, and spraying of organophosphate-type pesticides, considered to be the most hazardous operations. In the study, African Americans working in formulating had the highest rates of pesticide-induced liver and renal (kidney) dysfunction. Davis, The Impact of Workplace Health and Safety on Black Workers: Assessment and Prognosis, 31 Lab. L.J. 723, 729 and n. 31 (1980) (hereinafter cited as Impact).

[9] Reagan, Toxics at 41.

poor.[10] Work force environment cannot be ignored as a source of the disparity, as many studies have shown.

In an article focusing on the impact of workplace health and safety on African American workers, the author concludes that:

> [I]llness, disease, and death has continued to take its toll among black workers, due to unchecked hazardous working conditions and exposure to toxic substances....

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[10] There has been a longstanding disparity in the health status of African Americans when compared to whites. Life expectancy at birth for white males in 1982 was 71.5 years; for African American males, it was 64.9 years. U.S. Dept. of Health and Human Services, Report of the Secretary's Task Force on Black & Minority Health, Vol I., at 64 (1985). In 1986, the death rate from all causes, per 100,000 population was: for all races 541.7; for white men 679.8; for African American men 1,028.9; for white women 387.7; for African American women 588.2. National Center for Health Statistics, U.S. Dep't of Health and Human Services, Pub. No. (PHS) 89-1232, Health, United States, 1988, at 62-63 (1989) (hereinafter cited as Health, United States)

> Fifteen percent of the black work force (one to one and one-half million) are unable to work due to permanent or partial job-related disabilities. Black workers have a 37 percent greater chance than whites of suffering an occupational injury or illness. Black workers are one and one-half times more likely than whites to be severely disabled from job injuries and illness and face a 20 percent greater chance than whites of dying from job-related injuries and illnesses.[11]

Even with these known statistics and public recognition of the poor health indices of African Americans, there is no concerted effort to identify and remove hazardous conditions in the workplace. Fetal protection policies further remove from public debate the important question of the responsibility of federal and state governments for ensuring worker safety and for requiring employers to provide healthy

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[11] Impact at 724 (footnotes omitted).

work environments for all workers. The impact of unhealthy environments, particularly with lead, is felt by men, women and children, and its devastating effects are felt disproportionately by African Americans.

1. Lead poses hazards for workers and poor urban children

Lead exposure poses serious health hazards for workers, as well as for poor, urban children. Found in paint, gasoline, food and food containers, lead causes disabling illness and brain damage, which can lead to lowered intelligence, erratic behavior and poor classroom performance in children. A study of blood lead levels found that the mean levels of blood lead were higher in African Americans than whites across all ages. It also found that within the central cities, the mean blood lead levels in African American children

were significantly higher than in white children.[12] Eleven percent of all inner-city children, 12% of African American children and over 18% of poor African American children possess dangerous blood lead levels.[13]

Effective regulation, particularly of leaded gasoline and leaded paint -- the two sources most commonly responsible for childhood lead poisoning -- can reduce lead exposure dramatically. Programs to identify and provide medical help to affected children can check and even reverse the symptoms of lead poisoning. During the 1970s several federally-funded programs addressed the problem of exposure to lead. Blood levels fell nationally

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[12] Mahaffey, et al., National Estimates of Blood Lead Levels: United States, 1976-1980, 307 New Eng.J. of Medicine 573, 575-76 (1982).

[13] Reagan, Toxics at 6 & n. 5.

during the 1970s, although greater improvement was seen for whites than for African Americans.[14] Such progress came to a halt in the 1980s.

Lead poisoning is a problem not only for urban children but also for adult African American workers. Many African American workers are employed in battery plants and lead smelters. For example, a sample of eight battery plants and lead smelters found that 52 percent of all blue collar jobs were held by non-whites. In one particular plant, all 42 of the workers - most of whom were African American - had lead poisoning.[15] Overall, approximately 835,000 workers in 120 occupations are exposed to lead on the job.[16]

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[14] Reagan, Toxics at 7.

[15] Reagan, Toxics at 11.

[16] Reagan, Toxics at 11.

Additional risks from exposure to lead and other dangerous substances are found in the homes of lead workers. Studies of families of lead, asbestos and beryllium workers have found that contamination of the home environment through such means as soiled work clothes may be associated with elevated disease levels in the families of the workers.[17] Regulation of workplace environments can reduce these unnecessary risks.

2. Occupational exposures to toxic substances can cause cancer

Fetal protection policies typically have been adopted in male-dominated, blue collar industries, without regard to the

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[17] Mullings, "Minority Women, Work, and Health," in Double Exposure: Women's Health Hazards on the Job and At Home 121, 130 and n. 63 (W. Chavkin, ed. 1984) (hereinafter cited as "Minority Women").

health of exposed male workers.[18] Many employers have instituted policies which exclude women from jobs which require exposure to hazardous substances, conditions, or physical agents, allegedly out of concern for fetal health.[19] In fact, some fetal protection policies exclude only fertile women from workplace hazards despite evidence that the hazard in question poses other non-reproductive health risks. Many workplace hazards which may pose fetal health risks also pose other

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[18] See, M. Paul, C. Daniels, and R. Rosofsky, Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey, 16 Am.J. of Indus. Medicine 267, 273 (1989) (restrictive practices more common among firms with male-intensive or evenly-proportioned production work forces than among those employing predominantly females).

[19] See, J. Bertin, "Reproductive Hazards in the Workplace" in Reproductive Laws for the 1990s: A Briefing Handbook 207-232 (N. Taub and S. Cohen, eds. 1989).

serious health risks to male and female workers.[20]

For example, occupational cancer may account for a significant portion of the increase in cancer rates among African Americans. The death rate among African Americans from lung cancer is about 20 times what it was 40 years ago. African Americans have worked with asbestos, benzene, coke oven emissions, arsenic, vinyl chloride and trichloroethylene, together with the 1200 chemicals identified by the National Institute for Occupational Safety and Health which induced tumors in animals. These exposures began to occur during the early 1900s large numbers of

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[20] Staff of House Comm. on Ed. and Labor, 101st Cong., 2d Sess., Report on The EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s, at 8, & n. 19 (Comm. Print 1990), ("toxic agents that affect reproductive health are likely to have other health effects as well.")

African Americans migrated from the South to urban industrial areas and entered the most strenuous and hazardous jobs in steel and automotive manufacturing.

A study of over 6,500 rubber workers in Ohio found that African American workers were concentrated in the more dangerous compounding and mixing areas. Twenty-seven percent of the African American workers in the study population, but only three percent of the white workers, had worked in this area of the plant.[21]

A study of coke plant steelworkers revealed that 89 percent of nonwhite coke plant workers were employed at the coke ovens while only 32 percent of white

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[21] Impact at 726-28 & n. 19. The five-year cancer survival rate for cancer of the prostate gland is 73.4% for white males and 62.8% for African American males. Health, United States at 92.

workers were employed in that capacity.[22] A cancer study of 59,000 steelworkers, comprising 62 percent of all U.S. males working in basic steel production, found twice the expected death rate from malignant neoplasms among nonwhite workers employed in the coke plant.[23] The study also found that the excess deaths for nonwhite coke plant workers was caused by cancer of the respiratory system. Twenty-five deaths from this cause were observed

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[22] Impact at 728 & n. 24.

[23] "One main area of hazardous exposures within the steel industry is the coke oven operation. The main function of this process is to produce metallurgical coke for use at the blast furnaces. Another function of this process is to recover chemical byproducts during the transformation of bituminous coal into coke. This process releases dangerous gases and dust particles, including the carcinogen Benzo (a) Pyrene." Impact, at 727. In 1986, the death rate from malignant neoplasms among white males was 158.8 deaths per 100,000, while among African American males it was 229.0. Health, United States at 62.

among nonwhite steelworkers employed at least five years in the coke plant, whereas only 7.3 of these cancer deaths would have been expected. Notably, the number of deaths for whites employed in this area was seven, with 8.4 having been expected.[24]

3. Textile workers suffer from Brown Lung and respiratory diseases

Studies of textile industry workers have shown disproportionate rates of respiratory disease, from byssinosis (Brown Lung), chronic bronchitis, and breathlessness among African Americans in high dust areas such as opening, picking, and carding operations.[25] More than a half million workers are employed in the cotton agriculture and yarn and fabric manufacture industries. Thirty thousand active and

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[24] Impact at 728 & n. 23.

[25] Impact at 729 & n. 30.

retired workers already suffer from Brown Lung, which is caused by exposure to cotton dust in inadequately ventilated work environments; 800 workers are completely disabled from the disease annually.

Cotton dust exposure is a health problem for African American workers: an average of 25 percent of textile workers, and as many as 60 percent in some areas, are African Americans.[26] In 1980, 57 percent of the 240,000 textile workers were women, while 20.7 percent of all operatives and 13.8 percent of all sewers and stitchers were African American women.[27]

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[26] Reagan Toxics at 33 & n. 9.

[27] "Minority Women" at 129 & nn. 49, 50.

B. The Health Status of African American Women Workers Is Adversely Affected by The Hazardous Work Conditions Found in Predominantly Female Occupations

Although 17 percent of all service occupations were filled by African Americans in 1987, African Americans, particularly women, filled an overwhelming number of the occupations that utilized toxic substances in the workplace. African Americans comprised over 34 percent of all cleaners and servants; 31 percent of all nursing aides, orderlies and attendants; 30 percent of maids and housemen; and 23 percent of all private household workers.[28]

While African American women represented 5.4 percent of the total labor force in 1981, they constituted 24 percent of all nursing aides, 19 percent of all

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[28] Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States 1989, at 389.

practical nurses, 16 percent of all health aides and 16 percent of all other health service workers.[29] Studies have shown that hospital workers have a generally high level of occupational diseases.[30]

A study of mortality among non-professional New York City hospital service workers, most of whom were African American women, suggests that nonprofessional workers may be at elevated risk for certain types of cancer. The study found particularly high rates of liver cancer among African American men and breast cancer among African American women. While unable to ascribe specific cancers to specific chemicals, the researchers noted

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[29] J. Malveaux, Low Wage Black Women: Occupational Descriptions, Strategies for Change, unpublished paper prepared for the NAACP Legal Defense and Educational Fund, Inc. 93 (1984) (hereinafter cited as Low Wage Black Women).

[30] "Minority Women" at 127 & n. 36.

that hospital workers are constantly exposed to ionizing radiation, anesthetic gases, benzene, ethylere oxide, formaldehyde, and alkylating agents - substances that have been linked to cancer. The study also questioned whether an excess of liver cancer among health service workers is associated with exposure to Hepatitis B virus, as a consequence of job-related activities such as cleaning, handling of patients' laundry, and other contact.[31]

Skin irritation and disease are widespread among hospital workers, service workers, and industrial workers.[32] Skin disease is the leading industrial disease in the United States today.[33] Industrial

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[31] "Minority Women" at 127 and n.38.

[32] J. Mager Stellman, Women's Work, Women's Health 82 (1977) (hereinafter cited as Women's Work).

[33] Women's Work at 121.

chemicals and cleaning solvents used by service workers can dissolve the wax in the skin, resulting in different degrees of skin irritations, or dermatitis. A comparatively large number of industrial chemicals can lead to the formation of skin growths, which may be either cancerous or benign.[34] One survey of patients with occupational dermatitis found that hospital work and cleaning accounted for 55 percent of all cases.[35]

Domestic workers use home-cleaning products daily, yet there is almost no product safety information available about them. In fact, the average household has as many as 250 chemicals which, if ingested, could send a child to the

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[34] Women's Work at 122-124.

[35] Women's Work at 124.

hospital.[36] Insecticides also pose a health hazard to domestic workers.[37] A 1981 U.S. National Research Council report suggests that better ways must be devised to reduce exposure to indoor contaminants. This is especially crucial for domestic workers who face long-term, low-level exposure to potential cancer-causing substances, or to contaminants that may cause respiratory infection and cardiovascular disease.[38]

Most low-wage African American women are found in service and operative jobs that put them at particular risk. In 1981, one in seven African American women worked as an operative. African American women

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[36] Rosenberg, "The Home is the Workplace" in Double Exposure 229 (W. Chavkin, ed. 1984) (hereinafter cited as "The Home is the Workplace").

[37] "The Home is the Workplace" at 233.

[38] "The Home is the Workplace" at 234-35.

represented 31 percent of all clothing ironers and pressers and 20 percent of laundry and dry cleaning operators.[39] Once again, African American workers tend to be concentrated in the dirtiest jobs within an industry. A study of laundry and drycleaning workers found that African American male and female death rates, from all causes, doubled those of white workers. In addition, the study showed that African Americans had higher death rates from cancer of the liver, lung, cervix, uterus and skin.[40]

Thirty percent of African American women workers are clerical workers.[41] Increasingly, young African American women are avoiding private household and service

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[39] Low Wage Black Women at 95.

[40] The Impact at 728 & n. 26.

[41] Low Wage Black Women at 77.

jobs - areas that have employed large numbers of older African American women - and moving into clerical jobs.[42]

The hazards of clerical work include muscular and circulatory disorders, fatigue, and exposure to dangerous chemicals such as benzene, toluene, and other organic solvents.[43]

Clerical workers also appear to be vulnerable to stress-related diseases. A study which found increased risk of coronary heart disease among clerical workers, examined the relationship of employment status and employment-related behaviors. The results of the study appear to show that an increased risk of coronary heart disease is related to features of the

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[42] Women's Bureau, U.S. Dep't of Labor, Bulletin 298, Time of Change: 1983 Handbook on Women Workers 63 (1983) (hereinafter cited as Time of Change).

[43] "Minority Women" at 128.

work environment, including lack of control and autonomy, nonsupportive relationships and limited physical mobility.[44] African Americans tend to be overrepresented among the lowest level of clerical workers -- file clerks, clerical assistants, typists, and telephone clerks[45] -- jobs that are often subject to speed-up, isolation and lack of job mobility.[46]

In sum, any policies which permit employers to avoid their duty to provide safe and clean working environments for all workers will have doubly devastating effects on African American workers who are disproportionately represented in the dirtiest jobs and the most hazardous industries. Health indices of African

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[44] "Minority Women" at 128.

[45] Low Wage Black Women at 96.

[46] "Minority Women" at 128.

Americans will continue to lag behind white Americans if employers are allowed to evade their responsibility for the toxic work environments that help to cause poor health outcomes.

It is unconscionable for OSHA and the medical research community and employers to focus on genetics and the behavioral and social characteristics of African Americans which may contribute to poor health status without also focusing on occupational exposures to toxic substances. Regulatory agencies have abdicated their responsibility for protecting the lives and health of Americans, especially African American workers and families.[47] Without more balanced analysis, no significant improvement in the health indices of African Americans should be expected.

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[47] See, Impact at 730; Reagan, Toxics at 57 and Preface.

IV. EXCLUDING ALL POTENTIALLY PREGNANT WOMEN FROM CERTAIN BETTER-PAYING JOBS WILL PLACE AFRICAN AMERICAN FAMILIES AT GREATER RISK OF POVERTY AND POOR HEALTH

As Judge Easterbrook cogently notes in his dissent in Johnson Controls, "rigorous implementation of fetal protection policies could close more than 20 million jobs to women...." UAW v. Johnson Controls, 886 F.2d 871, 914 and n.7 (7th Cir. 1989). African American women, who are already overrepresented in lower-paying industries and occupations, cannot afford to be excluded from participating in any occupation with growth potential and higher pay.

A. Women's Earnings Support Their Families

The wages of African American women contribute significantly to the earnings level of African American families. The median African American family income in

1985 was $24,570 for a married couple family. Median family income depended on whether the woman in the marriage worked: $30,502, if she was in the labor force and $15,129 if she was not. In contrast, whites had a median income of $36,992 if the wife worked, and $25,307 if the wife did not work.[48]

Among white, African American and Hispanic children, African American children were the most likely to have a mother who worked full time throughout the year, while white children were the most likely to have a mother who was employed less than full time, full year.[49] Seventy-

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[48] H. Pipes McAdoo, Changes in the Formation and Structure of Black Families: The Impact on Black Women 15 (Wellesley College Center for Research on Women, Working Paper No. 182, 1988) (hereinafter cited as Pipes McAdoo, Changes)

[49] Select Comm. on Children, Youth and Families, U.S. House of Representatives, 100th Cong., 1st Sess., U.S. Children and Their Families: Current Conditions and Recent Trends, 1987, at 13 (1987) (hereinafter cited as U.S. Children).

five percent of African American mothers with children under age 18 were in the labor force, compared to only 60 percent of white mothers with children under 18. Among women maintaining families alone, 62 percent of African American mothers with children under 18 were in the labor force, compared to 73 percent of white single mothers.[50]

The poverty rate for African Americans is abysmally high: 12.2 percent for married families; 22.9 percent for male householders; and a phenomenal 50.5 percent for female householders with no male present.[51] Most African American single mothers are in the work force but are unable to earn

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[50] U.S. Children at 20.

[51] H. Pipes McAdoo, Changes at 15.

sufficient wages to raise their family income level above poverty. In 1984, of 3,740,000 African American female-headed families, 57 percent had mothers in the labor force; 49% of these working mothers earned below $20,000; 21 percent earned below $7,000.[52]

Women who have principal responsibility for maintaining their own families are generally poor. They are more likely than other families to have only one earner, and to have preschool children who restrict labor force activity.[53] Whether

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[52] Comparable figures for white female-headed families: 68 percent had mothers in the labor force; 52 percent earned below $20,000 and 16 percent earned below $7,000. Children's Defense Fund, Black and White Children in America: Key Facts 122 (1985) (hereinafter cited as Key Facts).

[53] Time of Change at 25.

African American or white, young mothers under age 25 are very likely to be poor.[54]

African American women, on average, earn 56 cents for every dollar earned by white men.[55] African American women with college degrees earn a median income less than the median income of white males with eighth grade education.[56] Wage inequities particularly burden African American women who tend to be clustered in narrow bands of low-skilled jobs in occupational categories that are predominantly filled with women. It has been estimated that in 1981, more than 70 percent of all working African

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[54] Key Facts at 53.

[55] B. Thornton Dill, L. Weber Cannon, R. Vanneman, Pay Equity: An Issue of Race, Ethnicity and Sex 1 (National Committee on Pay Equity 1987).

[56] In 1982, college educated African American women had a median income of $16,183, while white males with an eighth grade education had a median income of $16,773. Key Facts at 62.

American women were employed in low-wage service, clerical, private household, retail sales and nondurable goods operatives jobs.[57]

B. Most Low-Wage Jobs Lack Employer-Provided Health Coverage

Most low-wage jobs in which African American women are overrepresented do not offer employer-provided benefit programs, including pensions and health coverage, particularly for dependent children.[58] Health care financing for Americans under age 65 is principally provided by employers. However, since 1980, employer-provided insurance for both catastrophic and routine care has become increasingly unavailable. The number of uninsured

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[57] Low Wage Black Women at 12.

[58] See, U.S. Commission on Civil Rights, Health Insurance: Coverage and Employment Opportunities for Minorities and Women, Clearinghouse Publication 72 (1982).

Americans rose by one-fifth, from 30.9 million in 1980 to 37.1 million in 1987.[59]

By 1986, one out of three children living in families in which at least one family member was employed had no coverage under an employer plan. By contrast, about half (50.7 percent) of African American children in such families were not covered.[60] Among children living in moderate-income families (those with incomes between 200 and 400 percent of the federal poverty level), the racial disparity is even more alarming. While 80.9 percent of white children in working moderate-income families had employer coverage in 1986, only 69.6 percent of

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[59] Children's Defense Fund, A Vision for America's Future 8 (1989) (hereinafter cited as A Vision).

[60] A Vision at 9.

comparably situated African American children were similarly protected.[61]

Having no health insurance places the existing children of African American working mothers in immediate peril. In fact, this lack of coverage and access to care may be more harmful than the potential hazard to uncontemplated future offspring posed by working in a job which may involve exposure to hazardous substances. Employers implementing fetal protection policies are trading off health risks and placing the health of existing children - and the stability of their families - in jeopardy.

One measurement of the health of a nation is its infant mortality rate. The United States' infant mortality rate was 10.4 deaths per 1,000 live births in 1986, placing it eighteenth in the world. The

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[61] A Vision at 9.

rate among African American infants was 18.0 deaths per 1,000 live births, which on its own, would rank the United States twenty-eighth in the world.[62]

The percentage of births to women who received prenatal care early in pregnancy has dropped three times in the 1980s -- most recently between 1985 and 1986, when it fell from 76.2 percent to 75.9 percent. If the very slow overall rate of progress made during the 1978-1986 period continues until the year 2000, one out of every five births (and more than one-third of African American births) will be to a woman who failed to receive this crucial care early in pregnancy.[63] Children born to women who fail to receive prenatal care are three times more likely to die in infancy than

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[62] A Vision at 4.

[63] A Vision at 4.

those whose mothers receive comprehensive care. Babies whose mothers receive inadequate care also are at greater risk of being born at low birthweight, a condition that increases the likelihood of permanent lifelong disabilities.[64]

Unimpeded equal employment opportunities, particularly for jobs with adequate wages, are essential for African American women and their families. Higher paying jobs in manufacturing industries are disappearing. Six of every seven new jobs created between 1979 and 1987 were in the retail trade or service industries -- sectors with the lowest average wage levels. Industries that have been shrinking since 1979 -- such as mining and manufacturing -- paid 42 percent more

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[64] A Vision at 12.

annually than those that were expanding during the same period.[65]

Policies which restrict access to better employment for women will have devastating effects on African American women, a group of Americans who are already hampered by intentional and covert race discrimination in employment, as well as inadequate education and training. African American women need full access to employment that provides a living wage, health and pension benefits, and family security and stability.

CONCLUSION

This case implicates two critical issues. First, the decision of the lower court jeopardizes long-standing principles of employment discrimination law. Distinct judicial approaches to the analyses of

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[65] A Vision at 18.

subtle and overt discrimination have been crucial to the effectiveness of Title VII in reducing the many forms of discrimination which continue to plague the American workplace. To blur these distinctions is to weaken the ability of Title VII to protect against even the most blatant forms of employment discrimination, such as the categorical exclusion of a class from employment opportunities.

Second, this case raises issues of employer responsibility for the maintenance of healthy work environments. As a consequence of disadvantage and discrimination, African American workers are overrepresented in dirty industries and jobs. Employment policies which focus on the danger of workplace hazards to only a particular class of people ignore the larger dimension of the problem and

threaten the health status of those workers who remain on the job.

For the reasons stated above, the judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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